**Legislative Summary** **LS-544E**

# BILL C-27: AN ACT TO AMEND THE CRIMINAL CODE (DANGEROUS OFFENDERS AND RECOGNIZANCE TO KEEP THE PEACE)

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# LEGISLATIVE HISTORY OF BILL C-27

| HOUSE OF COMMONS | | SENATE | |
|---|---|---|---|
| **Bill Stage** | **Date** | **Bill Stage** | **Date** |
| First Reading: | 17 October 2006 | First Reading: | |
| Second Reading: | | Second Reading: | |
| Committee Report: | | Committee Report: | |
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Royal Assent:

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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# BILL C-27: AN ACT TO AMEND THE CRIMINAL CODE (DANGEROUS OFFENDERS AND RECOGNIZANCE TO KEEP THE PEACE)*

## BACKGROUND

### A. Purpose of the Bill and Principal Amendments Made

Bill C-27, An Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace) was introduced by the Minister of Justice and given first reading in the House of Commons on 17 October 2006.(1)

The bill addresses, in two ways, the problem of offenders who have committed one or more violent or sexual offences. First, it tightens the rules that apply to dangerous offenders in the case of repeat offenders. Second, it extends the recognizance to keep the peace and clarifies the terms of recognizances in order to prevent repeat offences. More specifically, the bill makes the following amendments to the *Criminal Code*(2) (the Code):

- an offender convicted of a third violent or sexual offence ("primary designated offence") for which it would be appropriate to impose a sentence of two years or more is presumed to be a dangerous offender, and will therefore be incarcerated for as long as the offender presents an unacceptable risk to society (subclause 3(2) of the bill);
- a recognizance to keep the peace may be ordered for a period that does not exceed two years in the case of a defendant who has previously been convicted of a violent or sexual offence (clause 5 and subclause 6(1) of the bill);
- the conditions of a recognizance to keep the peace in relation to a violent or sexual offence may include participation in a treatment program, wearing an electronic monitoring device or requiring the defendant to observe a curfew (clause 5 and subclause 6(2) of the bill).

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) See the text of Bill C-27, http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=1&Mode=1&Pub=Bill&Doc=C-27_1.

(2) R.S. 1985, c. C-46.

On the other hand, the bill does not alter the regime that applies to long-term offenders other than in respect of assessment of the offender. The basic rules that apply to long-term offenders therefore remain the same. The regime for long-term offenders continues to provide a tool for Crown prosecutors who wish to ensure close supervision when an offender who presents an elevated risk, but who cannot legally be characterized as a dangerous offender, is released.

## B. The Dangerous Offender and Long-term Offender Regime[3]

### 1. Purpose of the Regime and Differences Between Dangerous Offenders and Long-term Offenders

The provisions applicable to offenders presenting a high risk of recidivism are set out in Part XXIV of the *Criminal Code*. It is important to note that these rules apply at the sentencing stage.

The primary objective of this regime is to protect the public from offenders who have committed "serious personal injury offences"[4] (dangerous offenders[5] or long-term offenders[6]) or a sexual offence[7] (long-term offenders) and who continue to pose a threat to

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(3) The information that follows is taken from Dominique Valiquet, *The Dangerous Offender and Long-term Offender Regime*, PRB 06-13E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, http://www.parl.gc.ca/information/library/PRBpubs/prb0613-e.htm.

(4) Section 752 of the Code defines the term as follows:

> "Serious personal injury offence" means
>
> (*a*) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
>
> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (*b*) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

(5) Subsection 753(1) of the Code.

(6) Paragraph 753.1(1)(*a*) of the Code. See *R.* v. *Weasel*, (2001) 181 C.C.C. (3d) 358 (C.A. Sask).

(7) It must be one of the sexual offences listed in paragraph 753.1(2)(*a*) of the Code – that is, an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault) – or serious conduct of a sexual nature in the commission of another offence.

society.[8] A very high proportion of these criminals have committed sexual offences. Indeed, in roughly 82% and 76.5% of cases, respectively, the offence that gave rise to the dangerous offender or long-term offender designation ("the underlying offence") was a sexual offence.[9]

Within this very limited group, dangerous offenders are, by definition, considered as being at higher risk to reoffend than long-term offenders and, unlike the situation for the latter,[10] there is no possible treatment that could control this risk in the community.[11] Thus, a long-term offender could, after being sentenced to a term of imprisonment of two years or more (other than life imprisonment),[12] be released under the conditions of a long-term supervision order;[13] by contrast, a dangerous offender will have to serve a prison sentence of indeterminate length.[14]

## 2. Background

In response to the recommendations made in 1938 by the Archambault Commission,[15] the first habitual offenders act was adopted in Canada in 1947.[16] An "habitual offender" was a person who had been convicted of three criminal offences. An offender of this type, and, later on, an offender who was a "criminal sexual psychopath,"[17] could be imprisoned

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(8) Subsection 753(1) of the Code (dangerous offenders) and para. 753.1(1)(*b*) (long-term offenders). See *R.* v. *Lyons*, [1987] 2 S.C.R. 309, 350; *R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 2.

(9) Public Safety and Emergency Preparedness Canada, *Corrections and Conditional Release Statistical Overview*, December 2005, pp. 103 and 105. In the general prison population, the proportion is about 12.5% (Shelly Trevethan, Nicole Crutcher and John-Patrick Moore, *A Profile of Federal Offenders Designated as Dangerous Offenders or Serving Long-Term Supervision Orders*, Research Branch, Correctional Service Canada, December 2002, p. 22). As regards the database containing information on sexual offenders, see the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 (came into force on 15 December 2004) and sections 490.011 *et seq.* of the Code.

(10) Paragraph 753.1(1)(*c*) of the Code.

(11) Subsection 753(1) of the Code. See *R.* v. *Ménard*, REJB 2002-35993 (Que. C.A.).

(12) Subsections 753.1(3) and 753.1(4) of the Code.

(13) Of a maximum duration of 10 years (*ibid*).

(14) Subsection 753(4) of the Code. The reference is to "preventive detention."

(15) Royal Commission to Investigate the Penal System of Canada, *Report of the Royal Commission to Investigate the Penal System of Canada*, Ottawa, 1938.

(16) *An Act to amend the Criminal Code*, S.C. 1947, c. 55. It was inspired by an act in the United Kingdom, the *Prevention of Crime Act, 1908* (8 Edw. 7, c. 59).

(17) That is, a person incapable of controlling his sexual impulses (*An Act to amend the Criminal Code*, S.C. 1948, c. 39, s. 43). Subsequent amendments would replace this expression by the term "dangerous sexual offenders" (*An Act to amend the Criminal Code*, S.C. 1960-61, c. 43, s. 32).

indefinitely. The rules were criticized, however, for applying to non-dangerous offenders as well[18] and for requiring recidivism as an eligibility condition.[19]

Feeling that the applicable regime did not adequately protect the public, the *Criminal Law Amendment Act, 1977*[20] started from scratch and enacted the current rules on dangerous offenders. In 1997, Bill C-55 introduced the long-term offender category in order to monitor these offenders in the community on a long-term basis because, even though they present a risk of recidivism, they cannot be characterized as dangerous offenders.[21]

## 3. Statistics

### a. A Limited Group

Between 1978 and April 2005, a total of 384 criminals were designated dangerous offenders.[22] In July 2006, there were 333 in the prison population and 18 on supervised parole.[23] While, on average, 14 people a year are designated dangerous offenders, that number has generally increased in recent years, rising from 8 (1978 to 1987) to 22 offenders a year (1995 to 2004).[24] According to April 2005 data, there were no women in this group, while the Aboriginal population accounted for 20.3% of dangerous offenders.[25]

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(18) For example, offenders convicted of property offences.

(19) See, for example, Committee on Corrections, *Report of the Canadian Committee on Corrections: Toward Unity: Criminal Justice and Corrections* (Ouimet Report), Ottawa, 1969.

(20) S.C. 1976-77, c. 53 (came into force on 15 October 1977).

(21) *An Act to amend the Criminal Code (high-risk offenders)*, S.C. 1997, c. 17 (came into force 1 August 1997). This act also introduced other amendments, such as extending a dangerous offender's period of ineligibility for parole (from three to seven years). Note also that, in 1995, a national system to detect high-risk offenders was created: the National Flagging System (NFS), which is maintained by the Royal Canadian Mounted Police (RCMP) and other police services.

(22) Public Safety and Emergency Preparedness Canada (2005), pp. 103 and 104. A large number of criminals were designated dangerous offenders in Ontario (161) and British Columbia (86), followed by Alberta (31), Quebec (30) and Saskatchewan (29).

(23) Public Safety and Emergency Preparedness Canada, *Dangerous Offender Designation*, http://www.psepc-sppcc.gc.ca/prg/cor/tls/dod-en.asp.

(24) Public Safety and Emergency Preparedness Canada (2005), p. 103. The lowest number of persons designated dangerous offenders was in 1978 (3) and the highest in 2001 (29).

(25) *Ibid*.

From 1 August 1997 to 10 April 2005, 311 criminals were designated long-term offenders, an average of some 39 a year.[26] As of the later date, there were four women in this group. It is worth noting that, according to 2001 data, the number of long-term offenders has increased continuously since the new provisions came into force in 1997.[27]

b. Offences

Ninety-three percent of dangerous offenders and 98% of long-term offenders had at least one previous conviction as adults.[28] Many dangerous offenders and long-term offenders are habitual criminals. At the time they were designated, 45% of dangerous offenders and 26% of long-term offenders had 15 or more previous convictions on their adult record.[29] This cycle of criminality often began at a young age. According to a 1996 study, 75% of dangerous offenders had a juvenile record and 96.6% showed evidence of forcible sexual activity before the age of 16.[30] With regard to the adults, the average age on first conviction was 22 (dangerous offenders) or 25 (long-term offenders).[31] However, the average age at the time of designation was around 40.[32]

When the underlying offence is not a sexual offence[33] – typically sexual assault or an act of pedophilia – it is still serious[34] and involves violence and coercion,[35] typically armed assault[36] or kidnapping or forcible confinement.

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(26) *Ibid*., p. 105. The majority were designated long-term offenders in Ontario (81), Quebec (79) or British Columbia (56).

(27) Trevethan, Crutcher and Moore (2002), p. 15.

(28) *Ibid*., p. 21.

(29) *Ibid*. Moreover, many dangerous offenders admit to having committed a large number of sexual offences for which they were not arrested – an average of 27 offences per offender. See James Bonta, Andrew Harris (Solicitor General of Canada) and Ivan Zinger, Debbie Carrière (Carleton University), *The Crown Files Research Project: A Study of Dangerous Offenders*, May 1996, http://ww2.psepc-sppcc.gc.ca/publications/corrections/199601_e.asp.

(30) Bonta *et al*. (1996).

(31) Trevethan, Crutcher and Moore (2002), p. 27.

(32) *Ibid*., pp. 19 and 27.

(33) In other words, in 18% (dangerous offenders) and 23.5% (long-term offenders) of cases (Public Safety and Emergency Preparedness Canada (2005), pp. 103 and 105).

(34) Trevethan, Crutcher and Moore (2002), p. 66. The dangerous offenders caused physical injury and serious psychological damage in 31% and 88% of cases, respectively. The percentages are 9% and 89% in the case of long-term offenders.

(35) *Ibid*., pp. 23, 26 and 60.

(36) Forty percent of dangerous offenders used a weapon while committing the underlying offence (*ibid*., p. 26).

c. Victims and the Risk of Recidivism

In cases where there have been previous offences, most dangerous offenders and long-term offenders have had three or more victims.(37) Female victims predominate.(38) Studies show that the majority of dangerous offenders (49%) and long-term offenders (61%) have victimized children.(39) As the factor most predictive of sex offence recidivism is a preference for children,(40) it is not surprising to learn that 98% of dangerous offenders and 90% of long-term offenders are classified as at high risk to reoffend. It should be noted that a majority of incarcerated dangerous offenders are placed in protective custody or administrative segregation.(41)

4. Existing Provisions of the *Criminal Code*

a. Offender Assessment

Before a Crown prosecutor submits a dangerous offender or long-term offender application, experts in corrections and mental health must assess the offender's behaviour in order to establish a psychological diagnosis.(42) In the case of a sexual offender, the sexual preferences and deviances will also be assessed. The assessment, which lasts a maximum of 60 days, is based on reasonable criteria for dangerousness(43) and on the possibility of supervising the offender in the community. The assessment report will be entered into evidence and the experts will be able to testify in court.

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(37) *Ibid*., p. 25. In other words, 80% of dangerous offenders and 75% of long-term offenders.

(38) *Ibid*., p. 26.

(39) *Ibid*., p. 25. Few offenders in the general prison population have victimized children.

(40) Bonta *et al.* (1996).

(41) Trevethan, Crutcher and Moore (2002), p. 10. Some 2004-2005 data provided by Correctional Service Canada show that it costs $113,591 per year to keep an offender in a maximum security institution (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 1st Session, 39th Parliament, 8 November 2006, 1535 (Ian McCowan)).

(42) Section 752.1 of the Code. See Solicitor General of Canada, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, May 2001, http://ww2.psepc-sppcc.gc.ca/publications/corrections/200105_Handbook_e.asp.

(43) For example: preference for children; criminal social environment; mental problems; antisocial tendencies (characterized by impulsiveness, egocentricity, thrill-seeking, inability to control one's actions, as well as a criminal propensity and flagrant indifference to the welfare of others) (Bonta *et al.* (1996)).

b. Application for a Finding

The Crown attorney must obtain the consent of the province's attorney general and give the offender seven clear days' notice before the date of the application hearing.(44) The notice must contain the grounds for making the application.

Depending on whether it is a dangerous offender application or a long-term offender application, the prosecutor must prove, beyond a reasonable doubt, very specific elements.(45) The prosecutor must therefore convince a judge sitting without a jury(46) that the offender presents a high risk of recidivism.

In the case of a dangerous offender, the judge must first be convinced that the underlying offence constitutes a serious personal injury offence.(47) At present, there are two opposing lines of decision on the question of whether the underlying offence under paragraph 725(*a*) of the Code must involve a high degree of violence and dangerousness.(48) The first line holds that the underlying offence must involve an objectively serious degree of violence or dangerousness.(49) The second line – supported by the Supreme Court of Canada in *Currie*(50) – holds, rather, that emphasis must be placed on the offender's previous conduct, and accordingly that it is not necessary that the underlying offence involve a high degree of violence. It is enough that the underlying offence correspond to the definition of serious personal injury in the Code.

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(44) Paragraphs 754(1)(*a*) and (*b*) of the Code.

(45) *R.* v. *B. (R.B.)*, (2002) 174 B.C.A.C. 243. Note that, before considering designating an offender a dangerous offender, the judge must determine whether a designation as a long-term offender would be more appropriate (*R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 40).

(46) Subsection 754(2) of the Code.

(47) Paragraphs 753(1)(*a*) and (*b*) of the Code.

(48) Pierre Béliveau and Martin Vauclair, *Traité général de la preuve et de procédure pénales*, 12th ed., Les Éditions Thémis, Montréal, 2005, paras. 2099A and 2100. The sexual assault offences in para. 725(*b*) need not be of any particular level of seriousness (*R.* v. *Hall*, (2004) 186 C.C.C. (3d) (Ont. C.A.)).

(49) *R.* v. *Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta.).

(50) [1997] 2 S.C.R. 260. See also *R.* v. *Goforth*, (2005) 27 C.R. (6th) 263 (Sask. C.A.), application to extend time for filing an application for leave to appeal denied [2005] S.C.C.A. No. 456; and *R.* v. *Trahan*, EYB 2006-100398 (C.Q. Que).

Second, after proving that the underlying offence constitutes a serious personal injury offence, the prosecutor must show that the offender represents a risk to society.(51) To do that, the prosecutor must prove that the offender demonstrates a marked indifference to the consequences of his or her actions,(52) that his or her behaviour is so brutal that it cannot be controlled,(53) or that the offender is incapable of controlling his or her actions or sexual impulses and will in all probability(54) cause death or other serious injury if he or she is not put in preventive detention.(55)

In the case of a long-term offender, the underlying offence must, first of all, be a serious personal injury offence or a sexual offence covered by paragraph 753.1(2)(*a*) of the Code. The judge must then be convinced that there is reason to impose a prison sentence of two years or more (other than a life sentence),(56) that the offender presents a high risk of recidivism, and that there is a real possibility of managing that risk within the community.(57)

In both cases, evidence concerning the offender's morality or reputation is admissible in court.(58) While prior convictions are not essential to decide that the dangerous offender or long-time offender designation is warranted,(59) most of these offenders have a criminal record. The prosecutor may also enter into evidence behaviour that did not result in a charge.(60) The judge will also examine the offender's previous behaviour to help evaluate the potential dangerousness.(61) In order to determine whether the risk can be controlled within the community, the court will consider, among other things, the offender's age, character, family or community support, and the circumstances of the offence.(62)

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(51) Note that the offender need not represent a danger to society as a whole; it is enough that the offender represent a danger to one identifiable victim (e.g., a former spouse) (*R.* v. *Imming*, [2000] R.J.Q. 215 (Que. C.A.)).

(52) Subparagraph 753(1)(*a*)(ii) of the Code.

(53) Subparagraph 753(1)(*a)*(iii) of the Code.

(54) See *R.* v. *Currie*, [1997] 2 S.C.R. 260, para. 42.

(55) Subparagraph 753(1)(*a*)(i) and para. 753(1)(*b*) of the Code.

(56) Subsection 753.1(4) of the Code.

(57) Subsection 753.1(1) of the Code.

(58) Section 757 of the Code.

(59) *R.* v. *Langevin*, (1984) 39 C.R. (3d) 333; Solicitor General of Canada (2001).

(60) *R.* v. *Neve*, (1999) 137 C.C.C. (3d) 97 (C.A. Alta).

(61) See *R.* v. *Ménard*, REJB 2002-35993 (C.A. Que).

(62) *R.* v. *Blair*, (2002) 164 C.C.C. (3d) 453 (C.A. BC).

c. Sentencing

Since 1997, a dangerous offender designation has automatically resulted in an indeterminate prison sentence in a penitentiary.(63) This is the harshest sentence in Canada's system of criminal law.(64)

While no statutory release date is provided,(65) a dangerous offender will be eligible for day parole after four years' imprisonment(66) and for ordinary parole after seven years.(67) Dangerous offenders who are paroled are monitored for the rest of their lives.(68) If they continue to present an unacceptable risk for society, they will stay in prison for life.(69)

In the case of long-term offenders, a prison sentence of two years or more (other than a life sentence)(70) will be followed by a long-term supervision order (LTSO), of a maximum duration of 10 years, in order to ensure the offender is monitored in the community.(71) It is important to note that a long-term offender remains eligible for parole. The LTSO does not

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(63) Subsection 753(4) of the Code. A large number of dangerous offenders have been incarcerated for over 20 years (Solicitor General of Canada (2001)).

(64) Department of Justice Canada, "Minister of Justice Proposes Stringent New Rules to Protect Canadians from Dangerous and High-risk Offenders," media release, 17 October 2006, http://canada.justice.gc.ca/en/news/nr/2006/doc_31908.html. See also *R.* v. *Ménard*, REJB 2002-35993 (Que. C.A.).

(65) See s. 127 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

(66) Paragraph 119(1)(*b*) of the *Corrections and Conditional Release Act*. In day parole, the offender must return to the correctional institution or community residential facility each night.

(67) After that time, the Parole Board must assess the offender's file every two years (subsection 761(1) of the Code).

(68) Solicitor General of Canada (2001).

(69) See sections 101 and 102 of the *Corrections and Conditional Release Act* and Charles B. Davison, "The Next Step after *Johnson*: The Royal Prerogative of Mercy and Dangerous Offenders," *Criminal Reports*, Vol. 13 (6th), 2003, p. 227.

(70) Subsection 753.1(4) of the Code.

(71) Subsection 753.1(3) of the Code. The average length of the prison sentences imposed is a little more than four and a half years (Trevethan, Crutcher and Moore (2002), p. 24). In 70.7% of cases, the court imposed a monitoring period of 10 years (Public Safety and Emergency Preparedness Canada (2005), p. 105). The LTSO extends the period of monitoring in the community, because research shows that the recidivism period is longer in the case of sexual offenders (Trevethan, Crutcher and Moore (2002), p. 4); see Public Safety and Emergency Preparedness Canada, *Sex offender recidivism*, Research summary, Vol. 9, No. 4, July 2004, http://www.psepc-sppcc.gc.ca/res/cor/sum/cprs200407_1-en.asp?lang_update=1.

take effect until the expiration date of the warrant of committal.(72) When the LTSO expires, it is still possible to lay an information every year under section 810.2 of the Code to ensure that the offender remains subject to conditions.(73)

While the order is in effect, the long-term offender must respect the conditions imposed by the National Parole Board (NPB).(74) Failure to observe the conditions of an LTSO is punishable by a maximum of 10 years' imprisonment.(75) As a preventive measure, the NPB may, in order to prevent a potential violation of the LTSO or to protect society, order the offender's imprisonment for a maximum period of 90 days.(76)

The Code allows an appeal of the dangerous offender or long-term offender designation.(77) The length of the supervision period imposed on a long-term offender under an LTSO may also be appealed.

## C. Recognizances to Keep the Peace

### 1. Purpose of Recognizances

A recognizance to keep the peace is a preventive measure that has been part of the Canadian legal system since 1892.(78) Generally speaking, it allows someone – very often a peace officer – to lay an information before a judge if there are reasonable grounds to believe that a particular offence will be committed. While it is not necessary that the defendant have

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(72) Subsection 753.2(1) of the Code. The period required to review an application for pardon (three or five years) will not begin until the LTSO expires (s. 4 and 4.01 of the *Criminal Records Act*, R.S. 1985, c. C-47).

(73) See *R.* v. *Goodwin*, (2003) 168 C.C.C. (3d) 14 (B.C.C.A.).

(74) Subsections 134.1(1) and (2) of the *Corrections and Conditional Release Act*. For example: abstain from consuming intoxicating substances; not possess a firearm; participate in a program for sexual offenders or a 90-day residency condition (*Normandin* v. *Canada (Attorney General)*, 2005 FCA 345). The offender or the NPB can ask the court to reduce the supervision period or cancel the order (subs. 753.2(3) of the Code).

(75) Subsection 753.3(1) of the Code. The prison sentence will be served in a penitentiary, even if it is a sentence of less than two years (par. 743.1(3.1) of the Code). As of 10 April 2005, 12 long-term offenders (representing some 11% out of a total of 105 long-term offenders subject to an LTSO) had been convicted of a new offence while they were being supervised under the LTSO (Public Safety and Emergency Preparedness Canada (2005), p. 106). In those cases, the LTSO was suspended until the offender had finished serving the new sentence (subs. 753.4(1) of the Code).

(76) Paragraph 135.1(1)(*c*) and subs. 135.1(2) of the *Corrections and Conditional Release Act.*

(77) Section 759 of the Code.

(78) See Department of Justice of Canada, *Dangerous and High-Risk Offender Reforms*, Backgrounder, 17 October 2006, http://canada.justice.gc.ca/en/news/nr/2006/doc_31910.html.

committed an offence, a reasonable fear of serious and imminent danger must be proved on a balance of probabilities.(79) In some cases, the consent of the attorney general must be obtained before the information may be laid.(80)

2. Types of Recognizance

The Code provides for four types of recognizance to keep the peace, relating to different offences or designed to protect different people. Those recognizances relate to:

- personal injury to a person or to his or her spouse or child, or damage to his or her property (section 810 of the Code);
- offences of intimidating a justice system participant or a journalist, a criminal organization offence or a terrorism offence (sections 83.3 and 810.01 of the Code);
- certain sexual offences in respect of a person under the age of 14 years (section 810.1 of the Code); and
- serious personal injury offences (section 810.2 of the Code).

Bill C-27 deals with only the last two types of recognizances, relating to sexual offences in respect of a person under the age of 14 years (clause 5 of the bill) and serious personal injury offences (clause 6 of the bill).

3. Conditions and Length of Recognizance

A judge may order that a defendant enter into a recognizance to keep the peace and be of good behaviour. The judge may also impose other reasonable conditions on the defendant to prevent the commission of an offence. Those conditions may include:

- providing a bond;
- not possessing firearms or other weapons;
- not approaching or communicating with the person named in the recognizance;
- not coming into contact with or attending a public place where persons under the age of 14 years may be present; and
- reporting to a correctional or police authority.

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(79) See *R.* v. *Budreo*, (1996) 45 C.R. (4th) 133 (Ont. S.C.), aff'd (2000) 32 C.R. (5th) 127 (Ont. C.A.) and *Québec (Procureur général)* v. *Nabhan*, REJB 2003-47974 (Que. C.A.).

(80) Subsections 83.3(1), 810.01(1) and 810.2(1) of the Code.

At present, the maximum length of all types of recognizance is 12 months.

4. Sentencing

If the defendant refuses to enter into a recognizance to keep the peace, the judge may commit him or her to prison for a term not exceeding 12 months. A breach of any type of recognizance is a hybrid offence punishable by imprisonment for a term not exceeding two years (indictable offence) or a fine not exceeding $2,000 or imprisonment for a term not exceeding six months, or both (summary conviction offence).(81)

## DESCRIPTION AND ANALYSIS

### A. Definitions (Clause 1)

The Code gives two definitions for "serious personal injury offence":

- offences for which the offender may be sentenced to imprisonment for 10 years or more (other than high treason, treason and murder) *and* that involve the use or attempted use of violence, conduct endangering another person or conduct inflicting severe psychological damage;(82) and
- all forms of sexual assault. (83)

The bill retains this definition of "serious personal injury offence," but clause 1 adds two other categories to this category of offences: designated offences and primary designated offences. It should be noted that an offence can be included in more than one category. Examples are sexual assault, attempted murder and assault with a weapon or causing bodily harm, which are found in three offence categories. The table in the appendix to this document sets out a list of the offences in each category.(84)

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(81) Subsection 787(1) and s. 811 of the Code.

(82) Section 752, definition of "serious personal injury offence" in para. (*a*).

(83) Section 752, definition of "serious personal injury offence" in para. (*b*).

(84) The table is not part of the bill; it is provided solely for information purposes, to assist the reader.

## B. Assessment of the Offender (Clause 2)

Before the prosecutor may make an application to the court for a finding that an offender is a dangerous offender or long-term offender, the dangerousness of the offender must be assessed by criminal justice and mental health experts.(85)

### 1. Obligation to Inform the Court and "Designated Offences"

At present, the application for assessment is made to the court by the prosecutor in cases where the prosecutor thinks it appropriate to do so.(86) A prosecutor has no obligation to inform the court of whether he or she intends to make an application.

Clause 2 of the bill imposes an obligation on the prosecutor to inform the court, as soon as is feasible before sentencing, whether he or she intends to make an application for assessment of the offender in certain specific cases. For example, in a case in which an offender who has been previously convicted of two designated offences (for each of which the offender was sentenced to at least two years of imprisonment) is convicted of an offence that is both a serious personal injury offence and a designated offence, the prosecutor has an obligation to inform the court as to whether he or she intends to make an application for assessment of the dangerousness of the offender (clause 2 of the bill, adding new s. 752.01 to the Code).

The definition of "designated offence" in section 1 of the bill includes any "primary designated offence" and a list of 25 offences (87) such as certain offences in relation to explosives, firearms, prostitution, luring a child, assault, kidnapping a minor, robbery, and breaking and entering, along with some of those offences as they appeared in previous versions of the Code.

### 2. Obligation to Refer the Offender for Assessment

At present, the court has the discretion, on application by the prosecutor, to refer an offender for assessment if the following two conditions are met:

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(85) Section 752.1 of the Code.

(86) Subsection 752.1(1) of the Code.

(87) Bill C-10 (An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act), 1st Session, 39th Parliament) adds two new offences to the list: breaking and entering to steal a firearm, and robbery to steal a firearm (see clause 7 of Bill C-27).

- the offender has committed a serious personal injury offence or a sexual offence referred to in paragraph 753.1(2)(*a*) of the Code;
- there are reasonable grounds to believe that the offender might be found to be a dangerous offender or a long-term offender.[88]

The bill provides that, in those circumstances, the court has an obligation to refer the offender to be assessed by experts (clause 2 of the bill, amending subsection 752.1(1) of the Code). Such an assessment is needed in order for an offender to be found by the court to be a dangerous offender or a long-term offender.

3. Filing the Assessment Report

At present, the person to whom the offender is remanded must file an assessment report with the court not later than 15 days after the end of the assessment period.[89] The prosecutor and defence counsel will be given a copy of the report.

The bill extends the period within which the report may be filed to 30 days (clause 2, amending subsection 752.1(2) of the Code). As well, if there are reasonable grounds for filing the report after that period, the court may allow it to be filed not later than 60 days after the end of the assessment period (clause 2 of the bill, adding new subsection 752.1(3) to the Code).

C. Application for Dangerous Offender Finding (Clause 3)

1. Presumption of Dangerous Offender and “Primary Designated Offence” (Subclause 3(2))

After the assessment report for an offender is filed with the court, the prosecutor may apply for a dangerous offender finding. At present, in order for an offender to be found to be a dangerous offender, the prosecutor must essentially prove two very specific facts beyond a reasonable doubt:

- the underlying offence is a “serious personal injury offence” as defined in section 752 of the Code;

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(88) Subsection 752.1(1) of the Code.

(89) Subsection 752.1(2) of the Code. The assessment period may not exceed 60 days (subs. 752.1(1) of the Code).

- the offender presents an actual threat and a risk of recidivism for society, as set out in paragraph 753(1)(*a*) or 753(1)(*b*) of the Code.(90)

The bill retains this "traditional" method for making a dangerous offender finding. Rather, subsection 3(2) of the bill adds another method of making that finding, by incorporating a presumption that certain repeat offenders are dangerous offenders.

Accordingly, anyone who is convicted a third time for a primary designated offence (the underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed) is presumed to be a dangerous offender (subsection 3(2) of the bill, adding new subsection 753(1.1) to the Code). It must be noted, however, that even in this case the court may find that the offender is a dangerous offender only where application is made by the prosecutor.(91)

It may be asked whether the three primary designated offences may have been committed in the course of a single event, or must have been committed at separate times. As the new subsection 753(1.1) of the Code is worded, it seems that the presumption applies where there are three successive convictions.

The definition of "primary designated offence" in clause 1 of the bill contains a list of 12 offences, such as certain sexual offences against minors,(92) sexual assault, attempted murder, assault with a weapon, causing bodily harm and kidnapping, with the addition of former sexual offences such as rape and indecent assault. These 12 primary designated offences are punishable by imprisonment for 10 years or more. Sexual assault is already defined as a "serious personal injury offence" under the definition in paragraph 752(*b*) of the Code. The other primary designated offences could be characterized as "serious personal injury offences" under paragraph 752(*a*) if the facts showed that they involved violence, conduct endangering another person or severe psychological damage.

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(90) In *Currie* ([1997] 2 S.C.R. 260, para. 42), the Supreme Court of Canada considered the burden of proof in the case of sexual assault: "The Court cannot forget that s. 753(*b*) does not require proof beyond a reasonable doubt that the respondent will re-offend. Such a standard would be impossible to meet. Instead, s. 753(*b*) requires that the court be satisfied beyond a reasonable doubt that there is a "likelihood" that the respondent will inflict harm … ."

(91) Subsection 753(1) of the Code.

(92) Sections 151, 152 and 153 of the Code. Sections 151 and 152 relate to victims under the age of 14, while s. 153 relates to victims aged 14 to 18. Bill C-22 (An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act, 1st Session, 39th Parliament) replaces "14 years" with "16 years."

a. Reversal of the Onus of Proof and Constitutional Rights

Clause 3(2) of the bill introduces a reversal of the onus of proof: after the prosecutor has proved that the offender has been convicted of a third primary designated offence (the underlying offence and the prior offences, for each of which a term of imprisonment of at least two years was imposed), the onus shifts to the offender, who must prove, on a balance of probabilities, that he or she does not present a threat to the life, safety or physical or mental well-being of other persons (see paragraph 753(1)(*a*) of the Code), or, if the third primary designated offence is a sexual assault, that the offender is able to control his or her sexual impulses and there is no likelihood of causing injury, pain or other evil to other persons (see paragraph 753(1)(*b*) of the Code).

With the reversed onus of proof in the bill, an offender could be found to be a dangerous offender notwithstanding any reasonable doubt as to his or her dangerousness or the risk of recidivism under the criteria set out in paragraph 753(1)(*a*) or 753(1)(*b*) of the Code.

On the other hand, it should be noted that in *Mack*,[(93)] the Supreme Court of Canada held that the standard of proof beyond a reasonable doubt applies only where the issue is the guilt or innocence of the accused. It should also be noted that where the accused has been convicted, he or she is no longer an "accused" within the meaning of section 11 of the *Canadian Charter of Rights and Freedoms* (the Charter), and so the presumption of innocence guaranteed by paragraph 11(*d*) does not apply.[(94)] In this case, the bill applies to people who have already been convicted. It therefore seems that the presumption of innocence could not be used to challenge the reverse onus that operates at the dangerous offender finding stage. In *Lyons*,[(95)] the majority of the Supreme Court of Canada was of the opinion that the right to be presumed innocent did not apply in the context of a dangerous offender application.

In its review of the various forms of reverse onus of proof in the Code before an accused is convicted, the Supreme Court took into account, having regard to the presumption of innocence and section 1 of the Charter, the importance of the objective, whether there are

(93) *R.* v. *Mack*, [1988] 2 S.C.R. 903.

(94) *Ibid*., para. 147.

(95) *R.* v. *Lyons*, [1987] 2 S.C.R. 309.

effective means available to Parliament to achieve that objective, and proportionality between the objective and the degree of impairment of constitutional rights.(96)

From another perspective, an offender who is presumed to be a dangerous offender under the bill could argue that he or she is being sentenced to imprisonment for an indeterminate period for offences for which he or she has already been punished. Paragraph 11(*h*) of the Charter might therefore come into play.

In section 12 scrutiny, the court must consider whether the sentence is grossly disproportionate for the offender or grossly disproportionate having regard to reasonable hypotheticals.(97) In *Lyons*,(98) the Supreme Court of Canada held that imprisonment for an indefinite period was not cruel and unusual treatment, contrary to section 12 of the Charter, because, *inter alia*, "… the group to whom the legislation applies has been functionally defined so as to ensure that persons within the group evince the characteristics that render such detention necessary."(99) In the opinion of the Court, the availability of parole for dangerous offenders "can truly accommodate and tailor the sentence to fit each offender's circumstances."(100)

Section 9 of the Charter provides protection against arbitrary detention or imprisonment. In *Lyons*,(101) the Supreme Court of Canada held that the rules governing dangerous offenders did not violate section 9 of the Charter; the Court stated:

> In this respect, I am in complete agreement with Crown counsel's submission that "… it is the absence of discretion which would, in many cases, render arbitrary the law's application." As he notes, "the absence of any discretion with respect to Part XXI [now Part XXIV] would necessarily require the Crown to always proceed under Part

(96) *Whyte* v. *The Queen*, [1988] 2 S.C.R. 3 (care or control of a motor vehicle, para. 258(1)(*a*) of the Code); *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303 (insanity, subs. 16(3) of the Code); *A. G. of Quebec* v. *Pearson*, [1992] 3 S.C.R. 665, *R.* v. *Morales*, [1992] 3 S.C.R. 711 (bail hearing, subs. 515(6) of the Code); *Downey* v. *The Queen*, [1992] 2 S.C.R. 10 (living on avails of prostitution, subs. 212(3) of the Code). In those decisions, the Supreme Court held either that the statutory provisions at issue did not violate the accused's constitutional rights or that notwithstanding the violation they were justified under s. 1 of the Charter.

(97) See *R.* v. *Wiles*, [2005] 3 S.C.R. 895.

(98) *R.* v. *Lyons*, [1987] 2 S.C.R. 309.

(99) *Ibid*., para. 45.

(100) *Ibid*., para. 48. Note that Bill C-27 does not alter the rules relating to parole for dangerous offenders.

(101) *Ibid*.

> XXI if there was the barest *prima facie* case and the Court, upon making a finding that the offender is a dangerous offender, would always be required to impose an indeterminate sentence."[102]

2. Discretion of the Court (Subclauses 3(1) and 3(2))

In 2003, the Supreme Court of Canada held, in *Johnson*,[103] that before considering finding that an offender is a dangerous offender the judge must consider whether the risk presented by the offender can be adequately controlled in the community, and thus whether it would be appropriate to apply the long-term offender rules. The Court said: "the imposition of an indeterminate sentence is justifiable only insofar as it actually serves the objective of protecting society."[104]

The bill does not alter this situation. Despite the fact that subclause 3(1) of the bill replaces "may" by "shall" in subsection 753(1) of the Code, the court still has discretion not to make a dangerous offender finding in a case where another sentence would adequately protect the public (subclause 3(2) of the bill, adding new subsection 753(1.2) to the Code). Accordingly, even if all the conditions exist that are necessary for a dangerous offender finding to be made, under the present law or as provided in the bill, the court may decide to impose a less severe sentence; that is:

- make a long-term offender finding; or
- impose a sentence for the underlying offence.

Subclause 3(2) of the bill provides that the parties need not prove that a less severe sentence would adequately protect the public (new subsection 753(1.2) of the Code). The court will base its decision on the evidence presented at the hearing on the application for a finding. The offender or his or her counsel will undoubtedly want to present evidence to show that a less severe sentence would be more appropriate.

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(102) *Ibid*., para. 64.

(103) *R.* v. *Johnson*, [2003] 2 S.C.R. 357, para. 40.

(104) *Ibid*., para. 36.

D. Recognizances to Keep the Peace (Clauses 5 and 6)

1. Recognizance in Relation to a Sexual Offence Against a Person Under the Age of 14 Years[105] (Clause 5)

Under section 810.1 of the Code, a judge may order that a defendant enter into a recognizance that includes conditions if there are reasonable grounds to believe that a person will commit one of the sexual offences listed in subsection 810.1(1) of the Code against a person under the age of 14 years:

- sexual interference;
- invitation to sexual touching;
- incest;
- anal intercourse;
- bestiality;
- child pornography;
- parent or guardian procuring sexual activity;
- householder permitting sexual activity;
- luring a child by means of a computer;
- exhibitionism; and
- any form of sexual assault.

a. Period of the Recognizance (Clause 5)

At present, the maximum period of a recognizance is 12 months.[106] The bill extends the maximum period to two years in a case in which the defendant has a criminal record for a sexual offence in respect of a person under the age of 14 years (clause 5 of the bill, adding new subsection 810.1(3.01) to the Code). The bill does not specify the nature of the previous sexual offence, but it may be presumed that this includes at least the sexual offences listed in subsection 810.1(1) of the Code.

(105) Note that Bill C-22 replaces “14 years” by “16 years.” See clause 8 of Bill C-27.

(106) Subsection 810.1(3) of the Code.

It must be noted that the two-year maximum period would not apply to a defendant who had entered into a recognizance to keep the peace in the past, because a recognizance of that nature does not amount to a criminal conviction. It seems that this would also be the case where a court had granted an absolute or conditional discharge for the previous offence.(107)

b. Conditions of the Recognizance (Clause 5)

Under the existing rules, the judge who orders a defendant to enter into a recognizance in relation to a sexual offence in respect of a person under the age of 14 years may impose such conditions as the judge considers to be necessary to guarantee that the defendant will keep the peace and be of good behaviour.(108)

Form 32 of the Code, which may be used to prepare the recognizance,(109) provides examples of conditions that may be imposed:

- report to a peace officer or other person designated;
- remain within the designated territorial jurisdiction;
- notify a peace officer or other person designated of any change of address, employment or occupation;
- abstain from communicating with the victim, witness or other person; and
- deposit his or her passport.

The present subsection 810.1(3) of the Code provides two examples of conditions that may be imposed in the specific case of a recognizance in relation to a sexual offence in respect of a person under the age of 14 years:

- prohibition on engaging in any activity that involves contact with persons under the age of 14 years, including using a computer system for the purpose of communicating with such persons;(110) and

(107) Subsection 730(3) of the Code.

(108) Subsection 810.1(3) of the Code.

(109) Subsections 810.1(5) et 810(4) of the Code.

(110) Paragraph 810.1(3)(*a*) of the Code.

- prohibition on attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre.[111]

Clause 5 of the bill provides that the judge may impose any "reasonable" condition[112] that the judge considers desirable (new subsection 810.1(3.02) of the Code), retains the two specific conditions set out above (except that the expression "community centre" is removed;[113] new paragraphs 810.1(3.02)(*a*) and (*b*) of the Code), and adds seven other examples of conditions that may be imposed:

- participate in a treatment program (new paragraph 810.1(3.02)(*c*) of the Code);[114]
- wear an electronic monitoring device (new paragraph 810.1(3.02)(*d*) of the Code);
- remain within a specified geographic area (new paragraph 810.1(3.02)(*e*) of the Code);[115]
- observe a curfew (new paragraph 810.1(3.02)(*f*) of the Code);
- abstain from the consumption of drugs or alcohol (new paragraph 810.1(3.02)(*g*) of the Code);
- not possess firearms or other weapons (new subsection 810.1(3.03) of the Code);[116] and
- report to the correctional authority of the province or an appropriate police authority (new subsection 810.1(3.05) of the Code).[117]

(111) Paragraph 810.1(3)(*b*) of the Code.

(112) Form 32 of the Code also specifies that the judge may impose other reasonable conditions.

(113) In *R.* v. *Budreo* ((2000), 32 C.R. (5th) 127), the Ontario Court of Appeal held that the concept of "community centre" was overbroad and contrary to s. 7 of the Charter.

(114) The Ontario Court of Appeal observed that a provision that would allow the judge to order the defendant to take a course or treatment or to take a particular drug, where the defendant's guilt has not been proved, as is the case in s. 810.1 of the Code, would raise serious Charter concerns (*R.* v. *Budreo* (2000) 32 C.R. (5th) 127, para. 41).

(115) Form 32 of the Code provides for a similar condition.

(116) Contrary to what the Code now provides in respect of recognizances in relation to serious personal injury offences (subs. 810.2(5.2)), a judge who decides not to impose this condition is not required to state reasons.

(117) Form 32 of the Code provides for a similar condition.

2. Recognizance in Relation to a Serious Personal Injury Offence (Clause 6)

Under section 810.2 of the Code, a judge may order that a defendant enter into a recognizance with conditions if there are reasonable grounds to believe that a person will commit a "serious personal injury offence."(118) Unlike a recognizance in relation to a sexual offence in respect of a person under the age of 14 years, prior consent of the Attorney General is required.(119)

a. Period of the Recognizance (Subclause 6(1))

Under the existing rule, the maximum period of a recognizance of this nature is 12 months.(120) Subclause 6(1) of the bill extends the maximum period to two years in a case where the defendant was convicted previously of a serious personal injury offence (new subsection 810.2(3.01) of the Code).

It should be noted that the two-year maximum would not apply to a defendant who had entered into a recognizance to keep the peace for the previous serious personal injury offence or was discharged by the court.(121)

b. Conditions of the Recognizance (Subclause 6(2))

At present, a judge who orders a defendant to enter into a recognizance in relation to a serious personal injury offence may impose such reasonable conditions as the judge considers desirable for securing the good conduct of the defendant.(122)

As noted under the preceding heading, Form 32 of the Code, which may be used to prepare the recognizance,(123) provides examples of conditions that may be imposed:

- report to a peace officer or other person designated;

(118) Section 752 of the Code provides the definition of "serious personal injury offence," which is essentially a offence involving violence that is punishable by a maximum of imprisonment for 10 years or more, or any form of sexual assault. This category of offences is used to make a dangerous offender finding.

(119) Subsection 810.2(1) of the Code.

(120) Subsection 810.2(3) of the Code.

(121) Subsection 730(3) of the Code.

(122) Subsection 810.2(3) of the Code.

(123) Subsections 810.2(8) and 810(4) of the Code.

- remain within a designated territorial jurisdiction;
- notify a peace officer or other person designated of any change of address, employment or occupation;
- abstain from communicating with the victim, witness or other person; and
- deposit his or her passport.

The present subsections 810.2(5) and 810.2(6) of the Code provide two other examples of conditions that may be imposed in a recognizance in relation to a serious personal injury offence:

- prohibition on possessing firearms or other weapons;[124] and
- report to the correctional authority of a province or to an appropriate police authority.[125]

Clause 6(2) of the bill retains those two conditions and adds five other examples of conditions that may be imposed by the judge:

- participate in a treatment program (new paragraph 810.2(4.1)(*a*) of the Code);
- wear an electronic monitoring device (new paragraph 810.2(4.1)(*b*) of the Code);
- remain within a specified geographic area (new paragraph 810.2(4.1)(*c*) of the Code);[126]
- observe a curfew (new paragraph 810.2(4.1)(*d*) of the Code);
- abstain from the consumption of drugs or alcohol (new paragraph 810.2(4.1)(*e*) of the Code).

If a comparison is made with recognizances in relation to sexual offences in respect of persons under the age of 14 years, the examples of conditions that may be imposed are identical except for the fact that in the latter case the judge may also impose specific conditions prohibiting the defendant from being in contact with or in the presence of a person under the age of 14 years in certain public places.

(124) Subsection 810.2(5) of the Code. A judge who does not impose this condition is required to give reasons (subs. 810.2(5.2) of the Code).

(125) Subsection 810.2(6) of the Code.

(126) Form 32 of the Code provides for a similar condition.

## COMMENTARY

Opinion is divided regarding the likely effectiveness of Bill C-27, its impact on crime rates and its effects on the justice system and the correctional system. While some interpretations of the American system have been offered to help put the bill in perspective, the debate often comes down to the issue of the reversal of the onus of proof.

Those who support the bill say that the burden of proof, which is on the Crown at present, is so high that a dangerous offender finding is rarely made.(127) On the other hand, it should be noted that imprisonment for an indeterminate period is the most severe sentence in Canadian law. It should therefore be imposed only in the most extreme cases, and where a judge has determined that it is the only way to protect society.(128)

The reverse onus is a major change in the Canadian justice system.(129) While the government defends the constitutional validity of its bill,(130) some observers, such as the British Columbia Civil Liberties Association and prisoners' rights groups, are of the opinion that the reverse onus could be successfully challenged under the *Canadian Charter of Rights and Freedoms*.(131) The presumption of innocence is a fundamental right in criminal law.

It should be kept in mind that the bill creates a burden of proof for the purpose of sentencing.(132) The offender is not being asked to prove his or her innocence. As John Les, Solicitor General of British Columbia,(133) has said, the offenders whom the bill addresses have already been convicted of a number of serious offences.

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(127) "An End to the 'Hug a Thug' Era," editorial, *The Toronto Sun*, 15 October 2006, p. C1. See also David Alford, "Revamped Offender Law Won't Mean Jammed Jails," *Calgary Herald*, 26 October 2006, p. A22.

(128) "Dangerous Initiative," editorial, *The Toronto Star*, 16 October 2006, p. A18.

(129) Kathleen Harris, "Crime Legislation Strikes Out: Critics. Bill Targeting Repeat Offenders Called 'Blatant Politics,'" *The Ottawa Sun*, 18 October 2006, p. 8.

(130) "Minister Takes Swing At The Three Strikes Editorial," editorial, *The Telegram* [St. John's], 18 October 2006, p. A6; The Canadian Press, "Canadians 'Stupid' to Lap Up Three-Strikes Law, Says Lawyer: Critics Call Bill Bad Legal Policy," *The Province* [Vancouver], 18 October 2006, p. A12.

(131) "Dangerous Initiative" (2006); "The Big Picture," editorial, *The Edmonton Sun*, 17 October 2006, p. C10; Lindsay Kines, "B.C. Solicitor General Backs 'Three Strikes' Legislation," *Times Colonist* [Victoria], 18 October 2006, p. A2. See also the position taken by David Paciocco, professor of law at the University of Ottawa, in Kirk Makin, "Critics Blast Three-Strikes Laws – They've Cost a Lot, but Done Little to Reduce Crime, U.S. Research Shows," *The Globe and Mail* [Toronto], 18 October 2006, p. A8.

(132) Grant A. Brown, "Record Affects Sentence," *Edmonton Journal*, 17 October 2006, p. A19.

(133) Kines (2006). As well, Mr. Les would prefer to see sexual predators incarcerated for an indeterminate period than to spend the large amounts of money currently being spent to have the police supervise them in the community.

Constitutional scrutiny does not end when a possible Charter violation is found. The courts may decide that a potential violation would be justified under section 1 of the Charter. Accordingly, some observers argue that the government's approach is reasonable and proportionate to the type of offenders in question, that is, hardened criminals.(134) The objective of the bill, to protect society from violent repeat offenders, certainly justifies the setting of a reasonable limit on the offenders' rights and freedoms.(135)

It should also be kept in mind that the bill provides for protective measures.(136) First, the circumstances in which an offender may be presumed to be dangerous apply only to a limited number of serious offences for which a prison sentence is provided. Second, the court in all cases retains its discretion to decline to make a dangerous offender finding. Unlike the law in California, an offender will always have an opportunity to satisfy the judge that the presumption should not be applied in his or her case.(137) And, as the present rules provide, the court will not be able to make a dangerous offender finding until after the offender has been assessed by a group of experts, and it can be made only if the Crown decides to make an application.(138) An offender will also be able to appeal both the conviction and the sentence imposed.(139)

Some observers believe that the existing law is already sufficiently severe, and that the government has not shown that the present system is not working properly.(140) The bill might even interfere with the proper operation of the present system. Others say that there would be a risk that Crown prosecutors and judges will perceive the legislative amendments as requiring that an offender have a criminal record in order for it to be possible to find him or her to be a dangerous offender.(141) At present, a dangerous offender finding may be made even if an offender has no criminal record. Some offenders who might be found to be dangerous offenders

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(134) David Asper, "Sound Sentencing," *National Post* [Toronto], 16 October 2006, p. A13.

(135) Clark Kassian, "'Three-Strike' Law a Great Idea," *Edmonton Journal*, 17 October 2006, p. A19; Alford (2006).

(136) Alford (2006).

(137) Asper (2006). In California, the court would however have the power not to apply the "three strikes" law in a particular case if this were in the interests of justice (John Martin, "Opponents of Tory 'Three Strikes' Legislation Are Playing Foul Ball," *The Province* [Vancouver], 20 October 2006, p. A20).

(138) Vic Toews, "Bill Designed to Reverse the Onus," *The Toronto Star*, 19 October 2006, p. A29.

(139) Asper (2006).

(140) "Dangerous Initiative" (2006). See also Harris (2006).

(141) See Harris (2006).

under the existing rules might therefore escape that finding if the bill were enacted. Some observers are concerned about the fact that the dangerous offender presumption applies only after three serious offences, each of which caused significant harm to the victims.(142)

On the other hand, given that the crime rate in Canada is not rising, it is argued that the bill cannot be justified.(143) Doubt can also be cast on the arbitrary decision to set at three the number of convictions needed for the presumption that the offender is dangerous.(144)

Despite the support expressed by victims' rights groups and the Canadian Police Association,(145) some observers have said that the bill will be ineffective in fighting crime.(146)

According to Professor Jean Sauvageau of the criminology department at St. Thomas University in Fredericton, this type of legislation is not a deterrent,(147) because a majority of violent crimes are committed impulsively and under the influence of alcohol or drugs.(148) The real deterrent is the possibility of being apprehended by the police, according to Professor Peter Rosenthal.(149) On the other hand, if offenders who have already committed three violent offences or sexual offences are incarcerated for an indeterminate period, they will not commit more offences during that time.(150)

Estimates of the additional number of offenders who will be affected by the new measures range from 30 to 50 per year, according to the government's figures, to 300, according to some observers.(151) Rosemary Gartner, a criminologist at the University of Toronto, has

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(142) "Dangerous Offender Law Is Based on Illusion, not on the Facts," editorial, *Vancouver Sun*, 20 October 2006, p. A18.

(143) Louise Botham, "Tough Bill Won't Reduce Crime," *The Toronto Star*, 18 October 2006, p. A27; Tracey Tyler, "There Is No Crime Epidemic, Says Former Chief Justice," *The Toronto Star*, 4 November 2006, p. A23.

(144) Botham (2006).

(145) Jim Brown, "Three-Strike Legislation Draws Heat From Critics," *The Toronto Star*, 18 October 2006, p. A08.

(146) See, for example, the position stated by Louise Botham, President of the Criminal Lawyers' Association, in Harris (2006).

(147) "Violent Criminal Clampdown Welcome," editorial, *The Winnipeg Sun*, 16 October 2006, p. 8.

(148) Botham (2006).

(149) The Canadian Press (2006).

(150) Kassian (2006); Alford (2006).

(151) Harris (2006); Don Martin, "Three-Strike Bill Isn't Dangerous – Bad Guys Are," *Calgary Herald*, 18 October 2006, p. A6.

pointed out that incarceration rates in Florida and California skyrocketed after a "three strikes" law was enacted.(152) According to John Martin, a criminologist at University College of the Fraser Valley, however, the crime rate fell by 45% over 10 years after the California law was enacted in 1994.(153) On the other hand, some observers argue that the American laws did not reduce the crime rate,(154) and, according to Jason Gratl, President of the British Columbia Civil Liberties Association, they had a disproportionate effect on minorities.(155)

In Canada, the cost associated with maintaining an offender in a maximum security institution is over $100,000 per year.(156) The bill will therefore result in additional costs to the correctional system, paid for by taxpayers, but still without reducing the crime rate.(157)

Some people, including Anthony Doob, a professor at the Centre of Criminology at the University of Toronto, say that the bill would also increase the number of trials, thus placing a heavier burden on an already overburdened justice system.(158) Additional costs would also have to be budgeted for legal aid services.(159)

Others, including the Attorney General of Ontario, Michael Bryant, argue that the bill is too broad.(160) The proposed measures would unduly extend the category of dangerous offenders.(161) The list of offences that could be used to presume that an offender is dangerous would include less serious offences and offences that are vaguely defined,(162) for example sexual interference,(163) invitation to sexual touching (164) or sexual exploitation.(165) On the other

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(152) Makin (2006). Reference is made to 43,000 inmates in California (Don Martin (2006)).

(153) John Martin (2006).

(154) "The Big Picture" (2006); Botham (2006). See the position taken by Neil Boyd, criminologist at Simon Fraser University, in Jim Brown (2006).

(155) Kines (2006).

(156) Botham (2006).

(157) *Ibid*.; The Canadian Press (2006).

(158) Makin (2006); Botham (2006).

(159) Asper (2006); Botham (2006).

(160) Terri Kelly, "Hypocrisy," *The Ottawa Citizen*, 17 October 2006, p. A15.

(161) See the position stated by Neil Boyd, criminologist at Simon Fraser University, in Jim Brown (2006), and by Jason Gratl, President of the British Columbia Civil Liberties Association, in Kines (2006).

(162) Jim Brown (2006).

(163) Section 151 of the Code.

(164) Section 152 of the Code.

hand,[166] it is pointed out that some serious offences are omitted from the list, such as second-degree murder,[167] manslaughter[168] and impaired driving causing death.[169] David Paciocco, a professor of law at the University of Ottawa, is of the opinion that the list should be short and the offences listed should involve a significant degree of violence.[170] It has also been pointed out that, unlike the situation in California, where a minor third offence can result in a very severe prison term,[171] the offences in the list are serious offences for which the maximum sentence is 10 years or more.[172]

The Chair of the Canadian Council of Criminal Defence Lawyers, Bill Trudell, has described the law as regressive.[173] Lawyer Clayton Ruby is of the opinion that this is a bad legislative decision.[174] In the view of Louise Botham, President of the Criminal Lawyers' Association, the funds that will be spent to incarcerate offenders under the bill would be better spent to manage the risks in the community and to fund rehabilitation programs.[175] And, as Patrick LeSage, the former Chief Justice of the Ontario Superior Court, says, the most important thing is to address the roots of crime.[176] Prevention is always key.

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(165) Section 153 of the Code.

(166) Tom Brodbeck, "My, What Sharp Teeth You Don't Have, Bill C-27," *The Winnipeg Sun*, 20 October 2006, p. 5.

(167) Section 229 and subs. 231(7) of the Code.

(168) Section 234 of the Code.

(169) Paragraph 253(*a*) and subs. 255(3) of the Code.

(170) Makin (2006).

(171) *Ibid*. According to the Justice Policy Institute, an American think tank, two thirds of the offences that have led to sentences of imprisonment for an indeterminate period were non-violent.

(172) Asper (2006); "Minister Takes Swing at the Three Strikes Editorial" (2006).

(173) "Violent Criminal Clampdown Welcome," editorial, *The Winnipeg Sun*, 16 October 2006, p. 8.

(174) The Canadian Press (2006).

(175) Harris (2006).

(176) Tyler (2006).

# APPENDIX

## SERIOUS PERSONAL INJURY OFFENCES, PRIMARY DESIGNATED OFFENCES AND DESIGNATED OFFENCES (1)

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 49 | Alarming Her Majesty | 14 years | ✓ | | |
| 52 | Sabotage | 10 years | ✓ | | |
| 76 | Hijacking | Life | ✓ | | |
| 77 | Endangering safety of aircraft or airport | Life | ✓ | | |
| 78 | Offensive weapons and explosive substances on board aircraft | 14 years | ✓ | | |
| 78.1(1) | Seizing control of ship or fixed platform | Life | ✓ | | |
| 78.1(2) | Endangering safety of ship or fixed platform | Life | ✓ | | |
| 78.1(4) | Threat endangering safety of ship or fixed platform | Life | ✓ | | |
| 80(*a*) | Breach of legal duty, explosive substance, causing death | Life | ✓ | | |
| 80(*b*) | Breach of legal duty, explosive substance, causing bodily harm or damage | 14 years | ✓ | | |
| 81(1)(*a*) and (*b*) | Using explosives, intent to cause bodily harm or death | Life | ✓ | | ✓ |
| 81(1)(*c*) and (*d*) | Placing or making explosives | 14 years | ✓ | | |
| 82(2) | Possession of explosives, criminal organization | 14 years | ✓ | | |
| 83.02 | Providing property for certain activities | 10 years | ✓ | | |

(1) Notice: Given that the first definition of "serious personal injury offence" (the second includes all forms of sexual assault) refers to the use of violence, dangerous conduct or severe psychological damage (in addition to requiring that the maximum term of imprisonment be 10 years or more), the list of offences in the category "serious personal injury offence" (apart from sexual assaults) is only a suggested list. It will be for the courts to determine whether a particular offence in fact constitutes a "serious personal injury offence" as defined in s. 752 of the Code. As well, the two new offences created by Bill C-10 (breaking and entering to steal a firearm, and robbery to steal a firearm) are not included. Offences in relation to drugs set out in the *Controlled Drugs and Substances Act*, for example trafficking in drugs, are also not included.

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 83.03 | Providing property or services for terrorist purposes | 10 years | ✓ | | |
| 83.04 | Using property for terrorist purposes | 10 years | ✓ | | |
| 83.12 | Freezing of property, disclosure or audit | 10 years | ✓ | | |
| 83.18 | Participation in activity of a terrorist group | 10 years | ✓ | | |
| 83.19 | Facilitating terrorist activity | 14 years | ✓ | | |
| 83.2 | Commission of offence for terrorist group | Life | ✓ | | |
| 83.21 | Instructing to carry out activity for terrorist group | Life | ✓ | | |
| 83.22 | Instructing to carry out terrorist activity | Life | ✓ | | |
| 83.23 | Harbouring or concealing terrorist | 10 years | ✓ | | |
| 83.231(3)(*a*) | Hoax – terrorist activity, bodily harm | 10 years | ✓ | | |
| 83.231(4) | Hoax – terrorist activity, death | Life | ✓ | | |
| 85 | Using firearm or imitation firearm in commission of offence | 14 years | ✓ | | ✓ |
| 87 | Pointing a firearm | 5 years | | | ✓ |
| 88 | Possession of weapon for dangerous purpose | 10 years | ✓ | | |
| 94 | Unauthorized possession (firearm, prohibited weapon, restricted weapon, prohibited device) in motor vehicle | 10 years | ✓ | | |
| 99 | Weapons trafficking | 10 years | ✓ | | |
| 100 | Possession for purpose of weapons trafficking | 10 years | ✓ | | |
| 102 | Making automatic firearm | 10 years | ✓ | | |

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 103 | Importing or exporting (firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition) knowing it is unauthorized | 10 years | ✓ | | |
| 151 | Sexual interference | 10 years | ✓ | ✓ | ✓ |
| 152 | Invitation to sexual touching | 10 years | ✓ | ✓ | ✓ |
| 153 | Sexual exploitation | 10 years | ✓ | ✓ | ✓ |
| 153.1 | Sexual exploitation of person with disability | 5 years | | | ✓ |
| 155 | Incest | 14 years | ✓ | ✓ | ✓ |
| 163.1(2) | Child pornography – making | 10 years | ✓ | | ✓ |
| 163.1(2) and (3) | Child pornography – printing/publishing/ distributing/exporting/ importing/making available/selling | 10 years | | | ✓ |
| 163.1(4) and (4.1) | Child pornography – possession/access | 5 years | | | ✓ |
| 170 | Parent or guardian procuring sexual activity | 5 years | | | ✓ |
| 171 | Householder permitting sexual activity | 5 years | | | ✓ |
| 172.1 | Luring a child using a computer | 5 years | | | ✓ |
| 212(1) | Procuring | 10 years | ✓ | | |
| 212(1)(*i*) | Stupefying or overpowering in order to permit any person to have illicit sexual intercourse | 10 years | ✓ | | ✓ |
| 212(2.1) | Aggravated offence in relation to living on the avails of prostitution of a person under the age of 18 years | 14 years | ✓ | | ✓ |

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 212(4) | Obtaining or communicating for the purpose of obtaining sexual services of a person under the age of 18 years | 5 years | | | ✓ |
| 220 | Causing death by criminal negligence | Life | ✓ | | |
| 221 | Causing bodily harm by criminal negligence | 10 years | ✓ | | |
| 234, 236 | Manslaughter | Life | ✓ | | |
| 238 | Killing unborn child in act of birth | Life | ✓ | | |
| 239 | Attempt to commit murder | Life | ✓ | ✓ | ✓ |
| 240 | Accessory to fact after murder | Life | ✓ | | |
| 241 | Counselling or aiding suicide | 14 years | ✓ | | |
| 244 | Discharging a firearm with intent | 14 years | ✓ | ✓ | ✓ |
| 244.1 | Causing bodily harm with intent – air gun or pistol | 14 years | ✓ | | |
| 245(*a*) | Administering noxious thing with intent to endanger life of a person or cause bodily harm to that person | 14 years | ✓ | | ✓ |
| 245(*b*) | Administering noxious thing with intent to aggrieve or annoy | 2 years | | | ✓ |
| 246 | Overcoming resistance to commission of offence | Life | ✓ | | |
| 247(2) | Traps causing bodily harm | 10 years | ✓ | | |
| 247(3) | Traps for the purpose of committing another indictable offence | 10 years | ✓ | | |
| 247(4) | Traps for the purpose of committing another indictable offence and causing bodily harm | 14 years | ✓ | | |

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 247(5) | Traps causing death | Life | ✓ | | |
| 249(3) | Dangerous operation causing bodily harm | 10 years | ✓ | | |
| 249(4) | Dangerous operation causing death | 14 years | ✓ | | |
| 249.1(4)(*a*) | Flight from peace officer, bodily harm | 14 years | ✓ | | |
| 249.1(4)(*b*) | Flight from peace officer, death | Life | ✓ | | |
| 252(1.2) | Failure to stop, bodily harm | 10 years | ✓ | | |
| 252(1.3) | Failure to stop, death | Life | ✓ | | |
| 253(*a*), 255(2) | Operation while impaired, bodily harm | 10 years | ✓ | | |
| 253(*a*), 255(3) | Operation while impaired, death | Life | ✓ | | |
| 262 | Impeding attempt to save life | 10 years | ✓ | | |
| 263(3)(*a*) | Duty to safeguard opening in ice, death | Life | ✓ | | |
| 263(3)(*b*) | Duty to safeguard opening in ice, bodily harm | 10 years | ✓ | | |
| 264 | Criminal harassment | 10 years | ✓ | | |
| 266 | Assault | 5 years | | | ✓ |
| 267 | Assault with a weapon or causing bodily harm | 10 years | ✓ | ✓ | ✓ |
| 268 | Aggravated assault | 14 years | ✓ | ✓ | ✓ |
| 269 | Unlawfully causing bodily harm | 10 years | ✓ | | ✓ |
| 269.1 | Torture | 14 years | ✓ | | ✓ |
| 270(1)(*a*) | Assaulting a peace officer | 5 years | | | ✓ |
| 271 | Sexual assault | 10 years | ✓ | ✓ | ✓ |
| 272(2) | Sexual assault with a weapon, threats to a third party or causing bodily harm | 14 years | ✓ | ✓ | ✓ |
| 273(2) | Aggravated sexual assault | Life | ✓ | ✓ | ✓ |
| 273.3 | Removal of child from Canada | 5 years | | | ✓ |

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 279(1), (1.1) | Kidnapping | Life | ✓ | ✓ | ✓ |
| 279(2) | Forcible confinement | 10 years | ✓ | | ✓ |
| 279.01 | Trafficking in persons | Life | ✓ | | ✓ |
| 279.1 | Hostage taking | Life | ✓ | | ✓ |
| 280 | Abduction of person under 16 | 5 years | | | ✓ |
| 281 | Abduction of person under 14 | 10 years | ✓ | | ✓ |
| 282 | Abduction by parent, guardian or person with custody in contravention of custody order | 10 years | ✓ | | |
| 283 | Abduction by parent, guardian or person with custody, whether or not there is a custody order | 10 years | ✓ | | |
| 343, 344 | Robbery | Life | ✓ | | ✓ |
| 348(1)(*d*) | Breaking and entering with intent (dwelling house) | Life | ✓ | | ✓ |
| 348(1)(*e*) | Breaking and entering with intent (place other than a dwelling house) | 10 years | ✓ | | ✓ |
| 423.1 | Intimidation of a justice system participant or a journalist | 14 years | ✓ | | |
| 424.1 | Threat against United Nations or associated personnel | 10 years | ✓ | | |
| 430(2) | Mischief causing actual danger to life | Life | ✓ | | |
| 431 | Attack on premises, residence or transport of internationally protected person | 14 years | ✓ | | |
| 431.1 | Attack on premises, accommodation or transport of United Nations or associated personnel | 14 years | ✓ | | |

| *Criminal Code* provision | Name of Offence | Maximum Term of Imprisonment | Serious Personal Injury Offence | Primary Designated Offence | Designated Offence |
|---|---|---|---|---|---|
| 431.2(2) | Placing or detonating an explosive or other lethal device in a public place, etc. | Life | ✓ | | |
| 433 | Arson – disregard for human life | Life | ✓ | | |
| 434 | Arson – damage to property | 14 years | ✓ | | |
| 434.1 | Arson – own property | 14 years | ✓ | | |
| 463(*a*) | Accessory after the fact or attempt to commit indictable offence for which an accused is liable to imprisonment for life | 14 years | ✓ | | |
| 464(*a*) | Counselling offence that is not committed | Same sentence as for attempt to commit offence | ✓ | | |
| 465(1)(*a*) | Conspiracy to commit murder | Life | ✓ | | |
| 465(1)(*b*)(i) | Conspiracy to prosecute an innocent person for an alleged offence for which that person would be liable to imprisonment for 14 years or life | 10 years | ✓ | | |
| 465(1)(*c*) | Conspiracy to commit another indictable offence | Same sentence as for the primary offence | ✓ | | |
| 467.12 | Commission of offence for criminal organization | 14 years | ✓ | | |
| 467.13 | Instructing commission of offence for criminal organization | Life | ✓ | | |